Wong Sow Peng & Anor v Tan Chyen Houi

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–169 OF 2001
KAMALANATHAN RATNAM J
10 APRIL 2002

Road Traffic *— Negligence — Road accident — Collision between motorcycles — Defendant did not testify in court — Plaintiff's version remained unchallenged — Whether trial judge ought to have accepted plaintiff's evidence*

The plaintiffs sued the defendant for damages arising from injuries suffered in a road accident. In his police report, the defendant stated that he was riding his motorcycle behind the first plaintiff's motorcycle when the first plaintiff suddenly and without warning cut across to the right. Due to the close distance between their motorcycles, the defendant could not avoid colliding into the first plaintiff's motorcycle. The first plaintiff's version was that he was riding his motorcycle at a speed of 25 km/hour and was about three feet from his left edge when the collision occurred from the rear. Under cross-examination of the first plaintiff, it was put to him that he had swerved to the right but the plaintiff denied the same. The defendant was absent throughout the proceedings. The sessions court judge found the first plaintiff totally liable for the accident and dismissed the plaintiffs' claims. The plaintiffs appealed.

Held, allowing the appeal:

(1) The sessions court judge found a material discrepancy between the first plaintiff's police report and his pleading. However, he did not set out what the material discrepancy was (see p 380A–B).

(2) What remained as acceptable and unchallenged evidence was the first plaintiff's version of the accident. It was merely put to the first plaintiff that he had swerved to the right lane during the collision although there was no reason why the first plaintiff would do that. The sketch plan showed no obstruction or pothole on the first plaintiff's path to cause him to swerve. In any case, what was most important was the defendant's failure to attend court to testify. The defendant must tell the court why the first plaintiff had swerved to the right, since the first plaintiff himself had denied the swerve. Since the defendant had failed to attend court in spite of numerous adjournments, the sessions court judge ought to have accepted the first plaintiff's evidence and found the defendant liable (see p 380C–D).

(3) As there was no evidence of the first plaintiff's negligence, if any, the court ought to have found the defendant totally liable to the plaintiffs (see p 380D–E).

[Bahasa Malaysia summary

Plaintif-plaintif telah mendakwa defendan yang berbangkit daripada kecederaan yang dialami dalam satu kemalangan jalan raya. Di dalam laporan polis beliau, defendan menyatakan bahawa beliau sedang menunggang motosikal beliau di belakang motosikal plaintif pertama bilamana plaintif pertama dengan tiba-tiba dan tanpa amaran telah memotong secara merintang ke arah kanan. Disebabkan jarak yang dekat antara kedua-dua motosikal mereka, defendan tidak dapat mengelak daripada melanggar motosikal plaintif pertama. Versi plaintif adalah bahawa beliau sedang menunggang motosikal beliau pada kelajuan 25km/sejam dan berada pada jarak lebih kurang tiga kaki daripada tepi kiri beliau ketika pelanggaran tersebut berlaku daripada belakang. Di bawah pemeriksaan balas plaintif pertama, telah dikemukakan kepada beliau bahawa beliau telah membelok ke kanan tetapi plaintif menafikannya. Defendan tidak hadir di sepanjang prosiding tersebut. Hakim mahkamah sesyen memutuskan plaintif pertama bertanggungan sepenuhnya bagi kemalangan tersebut dan menolak tuntutan-tuntutan plaintif. Plaintif-plaintif telah merayu.

Diputuskan, membenarkan rayuan:

(1) Hakim mahkamah sesyen mendapati percanggahan yang material antara laporan pomplaintif dan pliding beliau. Walau bagaimanapun, beliau tidak membentangkan apakah percanggahan material itu (lihat ms 380A–B).

(2) Apa yang kekal sebagai keterangan yang boleh diterima dan tidak dicabar adalah versi plaintif pertama mengenai kemalangan tersebut. Ianya telah hanya dikemukakan kepada plaintif pertama bahawa beliau telah membelok ke lorong kanan ketika pelanggaran tersebut meskipun tidak terdapat sebarang alasan mengapa plaintif pertama akan melakukan sedemikian. Pelan lakar telah menunjukkan tidak terdapatnya rintangan atau lubang pada lorong plaintif pertama yang menyebabkan beliau membelok. Dalam sebarang keadaan, apa yang paling penting adalah kegagalan defendan untuk menghadiri mahkamah bagi memberi keterangan. Defendan mesti memberitahu mahkamah mengapa plaintif telah membelok ke kanan, kerana plaintif pertama sendiri telah menafikan yang beliau telah membelok ke kanan. Oleh kerana defendan telah gagal untuk menghadiri mahkamah meskipun terdapatnya banyak penangguhan, hakim mahkamah sesyen sepatutnya telah menerima keterangan plaintif pertaama dan mendapati defendan bertanggungan baginya (lihat ms 380C–D).

(3) Oleh kerana tidak terdapat keterangan mengenai kecuaian plaintif pertama, jika ada, mahkamah haruslah memutuskan defendan bertanggungan sepenuhnya kepada plaintif-plaintif (lihat ms 380D–E).]

A **Notes**

For cases on road accident, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 391–420.

P Balachandran (*Subbaiyah & Co*) for the appellant/plaintiff.
P Ramanathan (*VP Nathan & Partners*) for the respondent/defendant.

B **Kamalanathan Ratnam J**: On 15 May 1998 at about 10.15pm, the first plaintiff was riding his motorcycle WBT 2383 with the second plaintiff his wife as pillion, along Jalan Ong Yi How and proceeding from the direction of Raja Uda towards the direction of Jalan Bagan Lalang when his motorcycle was collided into by motorcycle No PBQ 9886 ridden by the C defendant and which motorcycle was proceeding from his rear. This was what he had said in his police report and what he had pleaded.

Defendant's version

In his police report, the defendant stated that on the said day and time and D place, he was riding behind the first plaintiff when all of a sudden and without any signal, the first plaintiff cut across to the right. Because of the close proximity, he had no opportunity to avoid colliding into the first plaintiff's motorcycle. However, in his defence, the defendant stated that the first plaintiff had without warning swerved into the right lane from the left lane and into the defendant's path.

E

The evidence

Under cross-examination the first plaintiff testified that he was riding at a speed of about 25kmph and about three feet from his left edge when the collision occurred from his rear. His rear number plate was damaged. It was F then put to him that he suddenly swerved to the right from the left edge and into the defendant's path. This of course the first plaintiff denied. The pillion wife was of no help. She admitted that she knew nothing of the accident. The case was then adjourned to enable the plaintiffs to get their employers and to enable the defendant who was absent, to be present.

G On the day fixed for continued hearing, the plaintiffs' employer testified, after which the plaintiffs closed their case. Counsel for the defendant then informed the court that he had contacted his client who had informed him that he would attend and asked for the case to be stood down. When the case was recalled the defendant was again absent. The court then fixed the case for submissions to another date.

H On the day finally fixed for submissions, the learned sessions court judge found the first plaintiff totally liable and dismissed the claim of both the plaintiffs. This is the plaintiffs' appeal against that decision.

Findings of this court

I In his submission, the defendant took the issue that in the magistrate's court where the defendant had sued the first plaintiff and where the first plaintiff had not testified, the court had found the first plaintiff 70% and the

defendant 30% liable. The learned sessions court judge was not moved by this submission. In any case, counsel for the respondent/defendant Mr Ramanathan conceded from the outset that he was not relying on the principle of res judicata before me. In the circumstances, there is no necessity for me to consider at all the decision of the magistrate's court.

Having read the decision of the learned sessions court judge, I note that he had found a material discrepancy between the first plaintiff's police report and his pleading. As rightly, conceded by learned counsel for the defendant, unfortunately the learned sessions court judge did not set out in his grounds what he found was the material discrepancy. I have read the first plaintiff's police report and his pleadings and I find no material discrepancy.

What remains as acceptable evidence and as I might even add, as unchallenged evidence, is the first plaintiff's version of the accident. It was merely put to him that he had swerved from the left lane to the right lane during the collision. But why would the first plaintiff do that? The sketch plan and key tendered shows no obstruction or pot-hole on the first plaintiff's path to cause him to swerve. In any case, what is most important is the defendant's failure to attend court to testify. He must tell the court why the first plaintiff swerved, since the first plaintiff himself has denied the swerve. Since the defendant, for reasons only best known to him, had failed to attend court in spite of numerous adjournments, the sessions court ought to have accepted the first plaintiff's evidence and found the defendant liable. Since there was also no evidence whether from the defence or from the plaintiffs of the first plaintiff's negligence, if any, the court ought to have found the defendant totally liable to the plaintiffs.

In the circumstances, I allowed the appeal and set aside the judgment of the lower court dated 26 April 2001, on the issue only of liability since that was the only issue on appeal. I therefore found the defendant totally liable and ordered the costs of this appeal and of the court below to be paid by the defendant to the plaintiffs.

Appeal allowed.

Reported by Lim Lee Na